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No. 10-305

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTONS,

Petitioner,

VS.

EDWARD HAROLD SCHAD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 1

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Blackledge v. Allison, 431 U.S. 63 (1977).....10
Bobby v. Van Hook, 130 S. Ct. 13 (2009) 8
Correll v. Ryan, 539 F.3d 938 (9th Cir. 2008).....11
Correll v. Stewart, 137 F.3d 1404 (9th Cir. 1998) ...11
Day v. Donough, 547 U.S. 198 (2006).....5
Lambright v. Schriro, 490 F.3d 1103 (9th Cir. 2007) 11
Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 2001) 11
Schriro v. Landrigan, 550 U.S. 465 (2007) 6, 7, 10
Schriro v. Summerlin, 542 U.S. 348 (2004).....1
Strickland v. Washington, 466 U.S. 668 (1984) 6, 7
Tennard v. Dretke, 542 U.S. 274 (2004).....9
United States v. Dunkel, 927 F.2d 955 (7th Cir. 1992) 4-5
Williams v. Taylor, 529 U.S. 420 (2000) 1, 2, 5
Wong v. Belmontes, 130 S. Ct. 383 (2009) 8

STATEMENT OF THE CASE

Schad does not dispute that he murdered 74-year-old Lorimer Grove on or around August 1, 1978.[1]

REASONS FOR GRANTING THE WRIT

Schad claims that the state is unduly alarmed by the majority panel decision. (BIO at i.) However, nine judges of the Ninth Circuit agree that the majority panel decision is alarming. Judge Callahan's dissent from the denial of rehearing, joined by seven other judges, states: "I write separately [from Judge Rymer's panel dissent] to point out the gravity of the majority" departure from settled Supreme Court law, and to emphasize how it effectively eviscerates AEDPA's diligence requirement as well as the preliminary showing the Supreme Court has held a state prisoner must make to obtain an evidentiary hearing in federal court." (App. at A-3.) Judge Rymer's dissent states: "Now, with the majority's blessing Schad is making the federal court sitting in habeas an alternative forum for trying facts and issues which he made insufficient effort to pursue in state proceedings. That is precisely what *Williams*[2] says that federal courts should not become." (App. at A-56.) Judge Callahan's dissent concludes that the majority panel

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[1] Expressing disgruntlement with this Court's opinion in *Summerlin v. Schriro*, 542 U.S. 348 (2004), Schad asserts that this is one of a few remaining Arizona cases in which a judge imposed the death sentence. (BIO at 1, fn.1.) Schad is wrong; there are currently more than 50 such cases pending in the Ninth Circuit.

[2] *Williams v. Taylor*, 529 U.S. 420 (2000).

decision "represents a breathtaking departure from settled Supreme Court precedent and effectively eliminates all of the benchmarks set by AEDPA and the Court for a prisoner to obtain an evidentiary hearing in federal court." (App. at A-15.)

I. *The opinion conflicts with Williams.*

Under *Williams*, the record clearly shows a lack of diligence, because Schad did not present the state court with substantive affidavits to support his ineffective assistance claim, as required by Arizona law. Schad concedes that Arizona law requires that, to obtain an evidentiary hearing in post-conviction proceedings, a defendant must submit affidavits in support of a claim. (BIO, at 2.) As Judge Rymer stated: "Schad also asked for an evidentiary hearing in state court, which, if well-founded, might show diligence—but it doesn't here because he offered no facts and identified no witnesses in support." (App. at A-65.) The state court reasonably denied an evidentiary hearing, finding: "Defendant is simply asking to go on a fishing expedition with no showing of what would be turned up that the court did not already know at sentencing time and how that might affect sentencing." (App. D-4.)

Schad claims that he did file sufficient affidavits. (*Id.* at 6-7.) But the affidavits filed by mitigation expert Holly Wake only explained what she had done and what she further wished to do regarding possible mitigation evidence. (ER 301-02, 323-327 & 333-337; see also App. at B-83 to B-87.) It would have been easy for Schad to file substantive affidavits to support his ineffective assistance claim. Schad's

mitigation claim related to an abusive childhood. (ER 336.) However, whatever abuse Schad was subjected to was presumably known to him; thus the factual basis of his claim was known to him. To the extent allegations of abuse were not presented at sentencing, Schad could simply have filed an affidavit in post-conviction proceedings detailing any such abuse. Or one of his family members could have filed an affidavit detailing such abuse. Schad conceded to the district court that such information was "readily" available at the time of sentencing. (App. at A-64.)

Schad argues that, if his affidavits were insufficient, that was due to "obstacles." (BIO, at 14-15.) But he does not explain what "obstacle" there was to his filing an affidavit from himself or family members. Schad claims he was diligent, in view of the "obstacles" he faced. (BIO at 14-15.) He claims he could not have filed sufficient affidavits because of changes of defense counsel and court rulings on various requests for assistance. (BIO, at 6-7, 13-15.) Putting aside any work done by Schad's prior post-conviction lawyers, his last post-conviction lawyer, Rhonda Repp, had plenty of time to file substantive affidavits in support of his request for an evidentiary hearing. Schad concedes Repp was appointed in February of 1994. (BIO, at 14.) Mitigation specialist Holly Wake was appointed on July 16, 1995. Her first affidavit to the court was dated October 18, 1995. (ER 323-27.) Schad's notice of supplemental petition for post-conviction and request for an evidentiary hearing, based in relevant part on Wake's affidavit, was filed that same date. (ER 328-29.)

The trial court did not file its order denying an evidentiary hearing and relief until June 21, 1996. (App. D-1 to D-4.) Thus, Schad had plenty of time to file substantive affidavits from himself, or family members who knew of the alleged abuse, irrespective of any delays in appointment of experts or appropriate of additional funds.

Besides not finding a lack of diligence, the majority panel opinion additionally erred by remanding for an evidentiary hearing on diligence because: "Neither the state court nor the district court record, however, contains information sufficient for us to determine *whether or not* those efforts [by post-conviction counsel] were reasonable and whether Schad therefore acted diligently." (App. at A-45, emphasis added.) Schad now effectively concedes that was error by insisting that the current record is sufficient to show diligence. (BIO at 15-16.) The state argues that the record is sufficient to show a lack of diligence. (Pet. at 22.) Thus, the Ninth Circuit erred by remanding for an evidentiary hearing on diligence that neither party thinks is necessary.

Nor did either party request such a hearing. As Judge Rymer's states: "Neither is there basis for requiring an evidentiary hearing *on diligence*. Schad never asked for one." (App. at A-74.) Schad attempts to show that he did request one by citing vague requests for evidentiary development buried in various habeas pleadings, but those were not sufficient to alert the district court that he wanted a an evidentiary hearing on the issue of diligence. (BIO at 18-19.) *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.

1991) ("Judges are not like pigs, hunting for truffles buried in briefs."). Schad filed a separate motion for evidentiary hearing, which specified the issues on which he sought an evidentiary hearing. (ER 448, #82. That included a request for an evidentiary hearing on the issue of ineffectiveness assistance of counsel at sentencing, which the district court rejected, but no request for an evidentiary hearing on diligence. (ER B-125 to B-127.) Nor did Schad complain in his motion to alter or amend judgment that the district court had overlooked a request for an evidentiary hearing on diligence. Nor did Schad's briefs to the Ninth Circuit argue that the district court had erred by overlooking a request for an evidentiary hearing on diligence.

If the state court record was insufficient on the question of diligence, Schad loses, because it was his burden to show diligence, as noted by Judge Rymer's dissent. (App. at A-74.) *See Williams*, 429 U.S. at 440. In light of *Williams* and AEDPA's provisions, Schad's citation to civil cases involving burdens and presumptions on civil motions for summary judgment (BIO, at 15-16) is inapt. Schad also cites cases involving remands for evidentiary hearings on affirmative defenses, such as that the petition is barred by the statute of limitations. (BIO at 2-3.) But the burden of affirmative defenses is on the state. *See generally Day v. McDonough*, 547 U.S. 198, 208 (2006) (statute of limitations). As discussed above, the burden of showing diligence was on Schad.

The state court record in this case is more than sufficient to determine the diligence issue; it shows that Schad was not diligent because he did not file the

necessary affidavits. Even if evidentiary hearings on diligence were sometimes permissible if requested by the prisoner, to allow such hearings with a state record such as this one portends evidentiary hearings on diligence in almost every federal habeas proceeding in which the prisoner attempts to present new evidence to the federal court.

II. *The opinion conflicts with Landrigan.*

Landrigan requires a district court, before granting an evidentiary hearing to a state prisoner on an issue of ineffective assistance, to consider whether the prisoner has presented a colorable claim of ineffective assistance, taking into account AEDPA's deferential standards. *Schriro v. Landrigan*, 550 U.S. 465 (2007). Judge Callahan's dissent explains why the majority panel opinion conflicts with *Landrigan*. (App. A, at A-4 & A-11 to A-14.) Judge Rymer's dissent also notes the majority opinion's failure to consider the ineffective assistance claim under the deferential AEDPA standards. (App. A at A-75.)

Schad first asserts that "*Landrigan* is not implicated—at all. (BIO, at 23.) That, perhaps, is an attempt to explain why the panel majority did not do a *Landrigan* analysis in reviewing the alternative discussion of the *Strickland* issue by the district court. But, diligence aside, *Landrigan* requires a federal court to undertake that analysis before granting an evidentiary hearing. The dissent on denial of rehearing chastised the panel majority for failing to conduct a *Landrigan* analysis of the ineffective assistance claim, in view of the deferential AEDPA standards. (App. at A-12.)

Schad alternatively attempts to show that the panel majority did a *Landrigan* analysis, stating: "The majority concluded . . . that Schad alleged a colorable claim of sentencing counsel's ineffectiveness." (BIO, at 30, citing App. A, at A-39.) As pointed out by Judge Rymer's dissent, the first majority panel opinion failed to say anything at all about the district court's alternative findings regarding the ineffective assistance claim. (App. at A-75.) The district court found that counsel presented a strategically sound case in mitigation, and that the newly-presented information would not have changed the sentence. (App. at B-91 to B-100.) Finally, in the second amended opinion, the majority panel acknowledged the district court's alternative ruling, but simply dismissed it by saying: "We disagree with that ruling." (App. at A-45.)

Thus, if any *Landrigan* analysis can be discerned from the panel majority's decision, it was plainly inadequate, and certainly did not employ the deferential AEDPA standards. Rather, it just found a colorable claim because the newly-presented mitigating evidence regarding his childhood was "more powerful" than the evidence presented at sentencing." (App. at A-44.)

That is not a proper *Strickland*[3] analysis. For one thing, this Court, in reviewing an opinion from the Ninth Circuit, has rejected the "more-evidence-is-better approach" to presentation of mitigation evidence.

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[3] *Strickland v. Washington*, 466 U.S. 668 (1984). Schad's brief in opposition does not even cite *Strickland*. (BIO, at iii-iv.)

Wong v. Belmontes, 130 S. Ct. 383, 389 (2009). Nor did the majority panel view the new mitigation against the aggravating circumstances, which is part of the prejudice analysis. *See Bobby v. Van Hook*, 130 S. Ct. 13, 18-19 (2009) (even if counsel's performance had been deficient, Van Hook had not proved prejudice, given the weighty aggravation). In this case, there were two aggravating circumstances, one of which was a prior murder, which is certainly weighty aggravation.

Moreover, the district court analyzed the sentencing proceedings and found that counsel was not deficient in relying on "good man" mitigation rather than conflicting "damaged man" mitigation. (App. at B-92 to B-93.) The panel majority opinion recognizes that sentencing counsel called fifteen witnesses, most of whom testified to Schad's "good reputation and behavior as an adult, and particularly regarding his good behavior while in prison." (App. at A-33.) Counsel presented a psychiatrist who testified about Schad's "miserable childhood" and mental condition. (App. at A-35.) The pre-sentence report also discussed Schad's reporting a "very stormy childhood, with his father being an alcoholic and abusing the defendant on a regular basis." (App. at A-35.) The trial court found that Schad's character and signs of rehabilitation was the most persuasive mitigating circumstances; it noted Schad's "unfortunate childhood," but found it not to be a "persuasive mitigating circumstance." (App. at A-37.) The majority panel opinion ignores that Schad was 36 years old at the time of the crime, and does not discuss whether counsel's strategy was reasonable, except for noting the "more powerful" mitigation evidence regarding Schad's childhood.

Schad attempts to cloud the issue by arguing that the state courts failed to consider Schad's childhood as mitigation, in violation of *Tennard v. Dretke*, 542 U.S. 274, 289 (2004).[4] (BIO, at 11-12, 17-18, 24, 32-33.) However, as discussed above, the sentencing court clearly *considered* the childhood mitigation evidence, but simply found that it was not a persuasive reason for imposing a life sentence. Its proper consideration of the evidence is confirmed by the fact that the panel majority addressed this issue, and specifically found no violation of *Tennard*. (App. at A-46 to A-52.)

Schad attempts to argue that the remand was justified because the district court's analysis was defective under *Tennard*, because it employed "the exact same constitutional error as the state courts. . . ." (BIO, at 32..) But, as discussed above, the three panel members found no *Tennard* violation by the state courts, and so a similar analysis by the district court could not have been a *Tennard* violation. Schad quotes the district court's finding, which was that the mitigating force of the childhood evidence was "attenuated" where there was no causal connection between the evidence and the crime. (BIO at 32, citing ER 75.)

The panel majority opinion also failed to address whether it was an abuse of discretion for the district

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[4] The Ninth Circuit has a line of jurisprudence that some Arizona trial judges failed to consider mitigation because of a causal nexus requirement, in violation of *Tennard*, which the state disputes. But that is beside the point, because the Ninth Circuit itself found no *Tennard* violation here.

court to consider the merits of the issue on the basis of an expanded record rather than holding an evidentiary hearing. This Court has endorsed the utility of "paper hearings." *Landrigan*, 550 U.S. at 474. *See also Blackledge v. Allison*, 431 U.S. 63, 81-82 (1977). Schad's brief in opposition extensively cites the new evidence he proffered to the district court. (BIO, at 25-28, 30-31.) By alternatively viewing an expanded record, the district court had sufficient evidence to deny the ineffective assistance claim on the merits, and the Ninth Circuit had a sufficient record to determine the claim on the merits. Schad does not say what additional evidence would be adduced at an evidentiary hearing.

III. *A remand would be neither appropriate nor brief.*

Schad claims that a remand would be appropriate and brief. (BIO at 20-23.) It would be neither.

First, any remand is inappropriate, for the reasons discussed above. As Judge Callahan noted, this case has already consumed "thirty years of litigation." (App. at A-4.) Both parties agree the current record is sufficient to decide the diligence issue. Judge Callahan's dissent concludes that the "seemingly innocuous decision to remand" is actually a substantial revision of AEDPA and "governing Supreme Court authority." (App. at A-14.) There was no basis for the majority panel to even suggest that the district court could hold a hearing on the merits of the issue before deciding the diligence issue.

Second, there is no basis for Schad's assertion that a remand will be "brief." Judge Callahan and her seven colleagues predict that: "The majority's order remanding for 'further proceedings' and a possible evidentiary hearing ensures that the litigation will continue *for several years more* despite every indication that it should end." (App. at A-5, emphasis added.) That prediction is supported by the time line of two Arizona cases that the Ninth Circuit remanded to the district court for evidentiary hearings on the issue of ineffective assistance at sentencing. In *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998), the Ninth Circuit remanded to the district court in 1998 and did not consider the district court's ruling until 2008. *See Correll v. Ryan,* 539 F.3d 938 (9th Cir. 2008) (granting writ as to sentencing, after rejecting district court's findings and conclusions regarding ineffective assistance claim, following an evidentiary hearing). In *Lambright v. Stewart*, 241 F.3d 1201 (9th Cir. 2001), the Ninth Circuit remanded to the district court for an evidentiary hearing in 2001; and did not consider the district court's subsequent ruling until 2007. *See Lambright v. Schriro*, 490 F.3d 1103, 1128 (9th Cir. 2007) (granting writ on sentencing, after rejecting district court's findings and conclusions regarding ineffective assistance at sentencing, following an evidentiary hearing).

Schad asserts that the panel majority only "suggests" simultaneous hearings on diligence and the substantive issue. But the district court is unlikely to ignore the appellate court's "suggestion."

Finally, this Court should consider not only the delay in this particular case, but the effect that the published majority opinion will have on other habeas cases. As Judge Callahan writes: "the majority's revision of the law is likely to engender confusion among the district courts as well as disparate outcomes in their rulings on state prisoners' requests for an evidentiary hearing." (App. at A-10.)

CONCLUSION

This Court should grant the petition for writ of certiorari, reverse that part of the Ninth Circuit opinion remanding to the district court for additional proceedings, and affirm the judgment of the district court denying habeas relief, as set forth in Judge Rymer's dissent.

Respectfully submitted

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